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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 600 ~~264, Miscellaneous~~

HERMAN LEE ROSS,
Petitioner

v.

STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 364, Miscellaneous

HERMAN LEE ROSS,
Petitioner

v.

STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner, Herman Lee Ross, a Negro, was indicted and tried for murder in the District Court for Galveston County, Texas. He was found guilty and the death penalty was recommended by the jury after the introduction of evidence which Petitioner does not contend was insufficient to sustain the verdict.[1]

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[1] Because this appeal is *in forma pauperis*, and in the interest of brevity, Respondent did not object to the preparation of a transcript to this Court which omitted the portion dealing with the facts of the crime involved. Petitioner was found guilty of shooting Guido Nesti, the keeper of a package store, during the perpetration of a robbery

Petitioner filed a motion to quash the indictment on the ground that he was denied the equal protection of laws and due process of the law guaranteed by the 14th Amendment to the United States Constitution. As grounds for these contentions Petitioner alleged in his motion that only two Negroes have served as grand jurors in Galveston County in the thirty years preceding Petitioner's indictment and that no Negro served on the grand jury which indicted the Petitioner (Tr. 11-12). No testimony was produced in support of the motion to quash, but counsel for the State and for Petitioner entered into a stipulation as to the facts which would be used to review and determine the merits of the motion.[2] The motion to quash was overruled by the trial court (Tr. 15).

Appeal was taken to the Texas Court of Criminal Appeals, the court of last resort in criminal matters.

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and while the victim was standing with his hands upraised. At the time he was arrested, Petitioner shot at the arresting officers and severely injured two of them. In its opinion the Texas Court of Criminal Appeals stated:

> "The facts of this case show without dispute a murder for the purpose of perpetrating a robbery. The appellant is a negro, his victim a white man, an Italian by birth. In addition to the circumstances of the crime, appellant's own witness placed on the stand by his attorney to testify in his behalf, Dr. E. A. Etter, testified that he had known appellant all of his life; that he had long been a sufferer from tuberculosis and syphilis; that: 'He had been an outcast, a waif of society, * * *.' He said that appellant had a tendency to kill and wanted to kill, and that he had never mixed with society or made any contribution to it." *Ross v. State*, 233 S. W. 2d 126 (1950, not yet officially reported).

[2] This "Stipulation of Fact" is set out as an appendix to the Petition for Certiorari in this cause.

That court affirmed the conviction and the action of the trial court in overruling the motion to quash the indictment.[3]

The single point raised by the petition for certiorari is that it was error for the Texas court to affirm the conviction since Petitioner is a Negro and "no Negroes were called for grand jury service in the instance case."

STATEMENT OF THE CASE

The method of selection of grand jurors, as provided by the Constitution and statutes of Texas,[4] has recently been reviewed by this Court and its validity accepted.[5]

Petitioner does not now attack the validity of this method of selection. The stipulation between counsel for the State and Petitioner contains several par-

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[3] *Ross v. State*, 233 S. W. 2d 126 (1950, not yet officially reported). In its original opinion the Texas Court of Criminal Appeals reversed the judgment of the Trial Court and dismissed the prosecution. On motion for rehearing by the State, the Court set aside its original opinion and affirmed the judgment of the trial Court, stating: "It is our judgment that this appellant has received a fair and impartial trial as he admits, and thus believing, the State's motion for a rehearing is granted, the order of reversal is set aside, and the judgment is now affirmed." As an appendix to the Petition for Certiorari, Petitioner has attached only the original opinion of the Texas Court, the dissent, and the opinion on Petitioner's Motion for Rehearing after the Court had set aside its original opinion.

[4] Section 13, Article V and Section 19, Article XVI, Texas Constitution; Articles 333, 335, 336, 338, 339, 340, and 344, Texas Code of Criminal Procedure (Vernon, 1948). These constitutional and statutory provisions are set out in the Appendix at pages 15 to 18.

[5] *Akins v. Texas*, 325 U.S. 398 (1945); *Cassell v. Texas*, 339 U.S. 282 (1950).

agraphs which are pertinent to the points to be raised in this reply and which set out the background upon which this case must be decided.

Since the "Stipulation of Fact" in this cause is set out in its entirety as an appendix to the petition for certiorari, only those paragraphs which are pertinent to the argument to be made in this reply and which, it is felt, sufficiently state the facts of the case will be set out in this reply. They are:

5.

"For a period of 30 years next preceding the return of the indictment in this cause only two Negroes have served as grand jurors in Galveston County."

6.

"The grand jury that indicted defendant in this cause consisted of 12 white men."

8.

"In the selection of petit or trial juries Galveston County is now and for many years has been governed by Articles 2094-2095, R.C.S. of Texas, which statutes are made a part hereof by reference known as the Jury Wheel Law. . . ."

9.

"The defendant makes no contention that any discrimination is now or has ever been practiced in Galveston County against the placing in the jury wheel of the names of all Negroes residing in the county whose names appear on the tax lists. Defendant agrees that

the names of all Negroes residing in Galveston County whose names appeared on the tax rolls on the first of August preceding the return of the indictment in the instant case were placed in the jury wheel as required by law."

11.

"In short, it is agreed that in so far as the selection, drawing and summoning of petit or trial juries are concerned there is not now and has not been for many years any discrimination against Negroes in Galveston County."

13.

"Of the panel drawn for the trial of the defendant 82 men appeared and qualified of which number, 13 were Negroes, being approximately fiiteen (15%) per cent. Seven Negroes were examined before the jury to try defendant was completed. Of these seven, four were peremptorily challenged by the State, one was excused by the Court because of sickness and two were challenged for cause, because opposed to capital punishment. When the jury of twelve were completed, there remained six Negroes on the unexamined panel. Defendant used twelve peremptory challenges, the State used six."

14.

"That after the return of the indictment in the instant case, to-wit: the December, 1948 grand jury, two Negroes were appointed, and served; on the February, 1949 grand jury, one Negro was selected by the Commissioners but claimed his legal exemption because of being a practicing physician."

It is thus seen that in the selection of grand juries in Galveston County in the 30 years preceding the indictment of Petitioner, two Negroes served as grand jurors. There is no indication in the stipulation as to when these two Negroes served, hence it may well be that there was one Negro on each of the last two grand juries preceding that which indicted Petitioner, or it may be that there were two Negroes on the last grand jury prior to the one which returned the indictment in this cause. It is stipulated that no Negro served upon the grand jury which indicted Petitioner; however, two Negroes served upon the next grand jury and one Negro was called for the grand jury following but asked to be excused.

It is stipulated that there is no discrimination against Negroes in the selection of trial juries in Galveston County. In other words, Petitioner's contention is that there is discrimination in the selection of grand juries but no discrimination in the selection of the juries which try the cases and decide upon the guilt or innocence of the accused, and his conviction should be reversed. Indeed, in the trial jury which participated in the case against the Petitioner, there were six Negroes upon the unexamined panel after the jury was selected. Petitioner used only 12 of his 15 peremptory challenges, hence Petitioner could have, had he desired, challenged three of the white jurors in an attempt to secure Negroes upon the trial jury.

POINT ONE

There being no intentional or systematic exclusion of Negroes in the selection of the trial jury which

found Petitioner guilty, the lack of Negroes upon the grand jury, whose function is merely the returning of an indictment, is harmless error.

Argument and Authorities

It is well established that the use of a grand jury is optional with the several States and that indictment by grand jury may be abolished and indictment by information or complaint substituted.[6] The Texas Court of Criminal Appeals took judicial knowledge of the fact that

> "We have known of none ever having held such position [county attorney] in our memory save white persons. All judges since the days of the Reconstruction, as well as Justices of the Peace, and also Legislators, have been white persons; and it is only left as a matter of speculation how far the deeds of our fathers shall be the basis of an assumption of misdeeds for the present generation." (233 S.W. 2d 126, 131.)

Thus, should Texas abolish the grand jury and establish a procedure in felony cases of commencement by information issued by a magistrate, justice of the peace, judge, or whoever shall be denominated the issuing officer, the question of discrimination against Negroes in the selection of those elected officials would not arise. This would be true even though the persons who hold the office from which the information or complaint is issued would in each case be a member of the white race.

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[6] *Hurtado v. California*, 110 U.S. 516 (1883).

A grand jury in Texas has only one function. It may either return an indictment against a defendant or refuse to indict him. The duties of a Texas grand jury are set out in Article 381, Texas Code of Criminal Procedure, as follows:

> "The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person."

It is not incumbent upon the grand jury to hear the testimony of any witnesses other than those appearing for the prosecution. Based upon this evidence its sole function is to decide whether an indictment shall be presented. In the event of presentation of an indictment, no presumption is created as to the guilt of the accused. Indeed, the presumption of innocence continues throughout the trial and each element of the crime for which the accused has been indicted must be proved beyond reasonable doubt before a trial jury. On the other hand, should the grand jury decide that the accused has not committed the act which is brought to its attention, it can refuse to return an indictment, this being known in Texas as a "no bill."

An indictment is no evidence of guilt and cannot be so considered. It is a completely isolated incident from the trial itself, and is merely an antecedent step. In this regard, the grand jury is largely an arbitrary and autonomous body, granted the latitude to indict or not upon any quantity or quality of evidence. There is no jeopardy in a no bill and the

mere failure to indict does not act as a bar to the State's attorneys presenting the same evidence to other grand juries selected in the county. There being no statute of limitations on murder,[7] this would mean that in the instant case the prosecuting attorney of Galveston County could have attempted indefinitely to secure an indictment against the Petitioner. Even under the doctrine as established by this Court, it is entirely possible and highly probable, without successful contention of systematic exclusion or limitation, that in the future there will be a grand jury without a Negro serving.

Inherent in the cases decided by this Court is the assumption that Negroes, qualified to serve as grand jurors, would not return an indictment against an accused simply because the accused was also a Negro, even though the same evidence would lead a qualified white man or twelve qualified persons of either race to either indict or find the accused guilty of the crime as charged. This, it is contended, is an unreasonable assumption. But even with this assumption, the State's attorney could overcome this bar by waiting for a grand jury composed entirely of white persons.[8] However, even under the present grand jury system in Texas it is not necessary that all the members of a grand jury vote to indict. The Texas statutes provide that nine members of a grand jury may

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[7] Article 180, Texas Code of Criminal Procedure (Vernon, 1948). Appendix, page 15.

[8] Gibson, *Racial Discrimination on Grand Juries*, 3 Baylor L. Rev. 29 (1950). The author of this article is Assistant County Attorney of Galveston County, the county where this case was tried.

indict.[9] Thus, assuming the correctness of the Court's assumption, and assuming that members of the Negro race served upon every grand jury, it would not necessarily mean that the grand jury would be compelled to refuse to return an indictment against a member of the Negro race.

These propositions, when coupled with the fact that all the members of a trial jury must vote for conviction, and only nine members of a grand jury need join in an indictment, serve to fortify the proposition that the absence of a Negro from the grand jury which indicted Petitioner was harmless error in view of the complete lack of discrimination over a long period of time in the selection of trial juries. The holdings of the Texas courts in the instant case were based mainly upon the same propositions as those presented in the dissent of Mr. Justice Jackson in *Cassell v. Texas*, 339 U.S. 281 (1950). In the *Cassell* case there was no stipulation such as in this case that "in . . . the selection . . . of petit or trial juries . . . there is not now and has not been for many years any discrimination against Negroes in Galveston County." It is respectfully urged that this Court, in the light of the stipulation in this case, consider the effect of the absence of a Negro from the indicting grand jury upon the end result of the complete trial procedure. Certainly no beneficial purpose will be served by reversing the conviction of the Petitioner in this case, making it incumbent upon the State to reindict and retry one who was convicted at what is admittedly

[9] Articles 391 and 393, Texas Code of Criminal Procedure (Vernon, 1948). Appendix, page 18.

a fair trial. Should there be indicated in the present record a policy or custom of intentional and systematic exclusion of Negroes from grand jury service, the abuse could best be corrected, as stated by Mr. Justice Jackson, in the enforcement of the existing Federal penal statutes.

POINT TWO

The practice, if any, of excluding Negroes from grand jury service having been discontinued prior to the selection of the grand jury which indicted Petitioner, absence of Negroes from the grand jury returning the indictment in this cause does not constitute a denial of the equal protection of laws.

Argument and Authorities

An attempt to review in any detail the law concerning discrimination against Negroes in the selection of grand juries is unnecessary in virtue of the familiarity of this Court with the law concerning that subject. Briefly stated, this Court has held that a mixed jury in each case is not required by the equal protection clause of the 14th Amendment.[10] It re-

[10] *Martin v. Texas*, 200 U.S. 316, 320 (1906): "A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race, because of their race, could be established by simply proving that no one of that race was on the grand jury that returned the indictment or on the petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment. . . ."

Snowden v. Hughes, 321 U.S. 1, 8 (1944): ". . . But a discriminatory purpose is not presumed . . .; there must

quires only that there be no intentional and systematic exclusion of Negroes from grand jury service solely because of race.[11] Systematic exclusion may be shown by a long continued exclusion of Negroes from grand jury service.[12]

The stipulation in this case is to the effect that two Negroes had served upon the grand juries of Galveston County in the 30 years preceding the selection of the grand jury which indicted Petitioner. It is also shown in the stipulation that Negroes have served or have been called upon the grand juries following that which indicted the Petitioner. Petitioner points out in his Motion for Rehearing in the Texas Court of Criminal Appeals that a Negro was appointed as Jury Commissioner in Galveston County and three Negroes served on the grand jury for the June Term, 1950.[13] There is nothing contained in the stipulation or in the record which would indicate which juries contained the two Negroes who, it is stipulated, served during the 30-year period. Based upon the presumption that the officials of a State or county will carry out their duties in a legal manner[14] and the stipulation in this record, Galveston County discontinued in recent

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be a showing of 'clear and intentional discrimination' . . . But a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race."

[11] *Ibid.*

[12] *Patton v. Mississippi*, 332 U.S. 463 (1948); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Norris v. Alabama*, 294 U.S. 587 (1935).

[13] Defendant's Motion For Rehearing in the Court of Criminal Appeals of Texas, p. 6.

[14] *Akins v. Texas, supra; Martin v. Texas, supra.*

years its practice of excluding Negroes from grand jury service.

This being true, the cases which hold that a showing of long continued absence of Negroes from grand juries creates a prima facie showing of intentional and systematic exclusion of Negroes from grand jury service are not applicable here. Certainly there is some time when a county can change its policy, and upon such a change the past acts of that county will no longer cast a stigma upon its future acts. This Court has indicated that it will accept some intermediate point as a beginning point for its determination as to the existence of a custom of exclusion.[15]

Thus, commencing with two grand juries prior to that which indicted Petitioner and with the exception of that particular grand jury, there have been from one to three Negroes on each grand jury up to June, 1950, the latest indicated in this record. There has also been a Negro Jury Commissioner in Galveston County. This clearly indicates an abandonment of any practice or custom which might have existed in the past and certainly does not leave the grand jury which indicted Petitioner tainted by any intentional or systematic exclusion of Negroes. There is no evidence that there was any element of intentional exclusion of Negroes from the grand jury which presented the indictment against Petitioner. Indeed, there is no evidence at all with regard to the selection of this grand jury. Absent a *prima facie* showing based upon past events, Petitioner's contentions must fall.

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[15] *Cassell v. Texas, supra; Akins v. Texas, supra.*

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court and that the petition for writ of certiorari should be denied.

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APPENDIX

Constitutional and Statutory Provisions of Texas

Constitutional Provisions

Article V Section 13: "Grand and petit juries in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

Article XVI Section 19: "The Legislature shall prescribe by law the qualification of grand and petit jurors."

Statutory Provisions[16]

Article 180: "An indictment for any other felony may be presented within three years from the commission of the offense, and not afterward; except murder, for which an indictment may be presented at any time."

Article 333: "The district judge shall, at each term of the district court, appoint three persons to

[16] Texas Code of Criminal Procedure (Vernon, 1948).

perform the duties of jury commissioners, who shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write.
2. Be qualified jurors and freeholders in the county.
3. Be residents of different portions of the county.
4. Have no suit in said court which requires the intervention of a jury."

Article 335: "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged."

Article 336: "The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county."

Article 338: "The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court."

Article 339: "No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.
2. He must be a freeholder within the State, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write.
5. He must not have been convicted of any felony.
6. He must not be under indictment or other legal accusation for theft or of any felony."

Article 340: "The names of those selected as grand jurors by the commissioners shall be written upon a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, 'The list of grand jurors selected at ..... term of the district court,' the blank being for the month and year in which the term of the court began its session. The commis-

sioners shall write their names across the seal of said envelope, direct the same to the district judge and deliver it to him in open court."

Article 344: "Within thirty days of the next term of the district court and not before, the clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify to it under his official seal and deliver it to the sheriff."

Article 391: "After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of an indictment, and, if nine members concur in finding the bill, the foreman shall make a memorandum of the same with such data as will enable the attorney who represents the State to write the indictment."

Article 393: "When the indictment is ready to be presented, the grand jury shall go in a body into open court, and, through their foreman, deliver the indictment to the judge of the court. At least nine members of the grand jury must be presented on such occasion."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 600

HERMAN LEE ROSS, *Petitioner*

vs.

STATE OF TEXAS *Respondent*

BRIEF FOR PETITIONER

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